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No. ____

In The
Supreme Court of the United States

RAYMOND L. BLEDSOE,
BILLY E. DACUS
And
MARSHALL DeWAYNE WILLIAMS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the Tenth Circuit erroneously ignored the unambiguous language of Section 235(b)(3), (Pub. L. 98-473, Title II) in ruling that the Defendants did not violate that statute by the United States Parole Commission's failure to establish release dates for Petitioners before October 11, 1989 within the applicable parole guidelines.

II. Whether Section 235(b)(3) became effective October 12, 1984 as held by other circuits and by Congress' mandate, or whether the Tenth Circuit erred in ruling that Section 235(b)(3) did not become effective until November 1, 1987.

III. Whether the Tenth Circuit violated the ex post facto, bill of attainder and due process clauses by applying retroactively Public Law 100-182, §2, which Congress expressly provided would apply only to offenses committed after the enactment of the Act on December 7, 1987 and which, in any event, did not resurrect the United States Parole Commission which became extinct as of midnight on October 11, 1989 by the terms of the original Section 235(b)(3).

LIST OF PARTIES

The name of all parties appear in the caption of the case. The Petitioners are not a corporation.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
LIST OF PARTIES	ii
CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS	1
BASIS OF JURISDICTION	1
STATUTORY PROVISION INVOLVED	1
STATEMENT OF THE CASE AND PERTINENT FACTS	2
REASONS FOR GRANTING THE WRIT	6
CONCLUSION	14

TABLE OF AUTHORITIES

Page

CASES

Carmell v. Texas, 529 U.S. 513 (2000) 10

Collins v. Youngblood, 497 U.S. 37 (1990) 9

Dallas v. Martin, 929 F.2d 587 (10th Cir. 1991) 4

Dobbert v. Florida, 432 U.S. 282 (1977) 11

Ex Parte Medley, 134 U.S. 160 (1890) 11

INS v. St. Cyr, 533 U.S. 289 (2000) 2, 7

Landgraf v. USI Film Products, 511 U.S. 244 (1994) 7

Lynce v. Mathis, 519 U.S. 433 (1997) 2, 8, 9, 10

Lyons v. Mendez, 303 F.3d at 285 (3rd Cir. 2000) 4, 5, 11

Martin v. Haddix, 527 U.S. 343 (1999) 7

Mistretta v. United States, 488 U.S. 361 (1989) 5

Norwood v. Brennan, 891 F.2d 179 (7th Cir. 1989) 4

Piekarski v. Bogan, 912 F.2d 224 (8th Cir. 1990) 4, 12

Rivers v. Roadway Express Inc., 511 U.S. 298 (1994) 7

Romano v. Luther, 816 F.2d 832 (2nd Cir. 1987) 11

United States v. Safarini, 257 F.2d 191 (D.C. 2003) 7

Weaver v. Graham, 450 U.S. 24 (1981) 9, 10, 11

Wolf v. Mcdonnell, 418 U.S. 539 (1974) 13

RULES AND STATUTES

18 U.S.C. §4206 ..... 5, 10

28 U.S.C. §2101 1

TABLE OF AUTHORITIES – Continued

Page

Public Law 98-473 2

Public Law 100-182 ..... *passim*

Public Law 101-650 12

Public Law 107-273 12

Senate Report No. 98-225 ..... 1, 3, 4, 13

CITATIONS OF OPINIONS AND ORDERS ENTERED BY LOWER COURTS

Raymond L. Bledsoe, Billy E. Dacus, Marshall E. Williams v. United States of America, United States District Court for the District of Kansas, Case No. 01-3168-RDR, 2002 U.S. Dist. Lexis 1515.

Raymond L. Bledsoe, Billy E. Dacus, Marshall E. Williams v. United States of America, United States Court of Appeals, Tenth Circuit, No. 03-3224.

Raymond L. Bledsoe, Billy E. Dacus, Marshall E. Williams v. United States of America, (10th Circuit December 3, 2004), order denying rehearing and suggesting for rehearing en banc.

BASIS OF JURISDICTION

This petition seeks review of a decision of the United States Court of Appeals for the Tenth Circuit which affirmed a decision by the United States District Court for the District of Kansas which decision ignored the proper application of an unambiguous federal statute, and which misapplication violated the ex post facto, the bill of attainder and due process clauses of the United States Constitution. This petition is authorized and timely under 28 U.S.C. §2101 and Rule 13(3) of the rules of the United States Supreme Court.

STATUTORY PROVISION INVOLVED

This case involves The Sentencing Reform Act, Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3220. More specifically, it

involves Section 235(b)(3) of that Act (Public Law 98-473, Title II, §235(b)(3)), Public Law 100-182, §2, and Public Law 100-182, §26.

STATEMENT OF THE CASE AND PERTINENT FACTS

This petition raises issues of exceptional public importance which affect not only the Petitioners but numerous federal prisoners in the same position. It directly challenges the continuing illegal existence of the United States Parole Commission ("Commission") in violation of an unambiguous federal statute in respect to them. The Tenth Circuit's misapplication of Congress' express mandate resulted in the Court's applying the statute in violation of the ex post facto, bill of attainder and due process clauses of the United States Constitution. The Tenth Circuit's decision conflicts with decisions of other circuits on two distinct points – i.e., both the effective date of the original Act and the application of the amendment – which conflict must be resolved by this Court. Moreover, this petition must be reviewed because the Tenth Circuit ignored controlling United States Supreme Court law (*Lynce v. Mathis*, 519 U.S. 433, 441 (1997)), by ruling that retroactive application of the statute at issue did not violate the ex post facto and bill of attainder clauses of the United States Constitution, and ignored the plain and ambiguous legislative command to apply the amendment to offenses occurring after December 7, 1987 again contrary to this Court's controlling holdings. *INS v. St. Cyr*, 533 U.S. 289 (2000).

In 1984, Congress passed the Sentencing Reform Act ("SRA") (S. Rep. 98-225, 1984 U.S.C.C.A.N. 3182, 3220),[1] by which Congress sought to create a sentencing structure that would eliminate disparity in sentencing, establish certainty for release from confinement, and abolish the Commission and the parole system. The Senate Report noted:

> At present, the concepts of indeterminate sentencing and parole release depend for their justification exclusively upon this model of 'coercive' rehabilitation ... Recent studies suggest that this approach has failed. Most sentencing judges, as well as the Parole Commission, agree that the rehabilitation model is not an appropriate basis for sentencing decisions.

(S. Rep. 98-225 at 3221, 3223) (Emphasis added.) The Senate Report continued:

> The efforts of the Parole Commission to alleviate this disparity unfortunately contributed to a second grave defect of present law: no one is ever certain how much time a particular offender will serve if he is sentenced to prison ... Thus, prisoners often do not really know how long they will spend in prison until the very day they are released. The result is that the existing Federal system lacks the sureness that criminal justice must provide if it is to retain the confidence of American society and if it is to be an effective deterrent against crime.

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[1] Senate Report 98-225, 1984 U.S.C.C.A.N. 3182 will hereinafter be cited by the respective page number as "S. Rep. 98-225 at ___."

(Id. at 3232-3233) (Emphasis added.) The Senate Report concluded:

> The shameful disparity in criminal sentences is a major flaw in the existing criminal justice system, and makes it clear, that the system is ripe for reform. Correcting our arbitrary and capricious method of sentencing will not be a panacea for all of the problems which confront the administration of criminal justice, but it will constitute a significant step forward.

(Id. at 3248.) (Emphasis added.)

Congress enacted Section 235(b)(3), effective October 12, 1984,[2] which required "the Parole Commission [to] set a release date consistent with the applicable parole guideline" for those in its custody "prior to the expiration of the five years," at which point the Commission would become extinct. Congress retained the Commission for five years solely "to set release dates for prisoners sentenced before that date" emphasizing that, by "the end of that period, the Parole Commission would set final release dates for all prisoners still in its jurisdiction." Senate Report No. 98-225, 98th Congress, First Session, September 12, 1983, p. 56 n.82.

In enacting Section 235(b)(3), Congress recognized the inherent arbitrariness underlying parole decisions. As the

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[2] *Lyons v. Mendez*, 303 F.3d at 285, 289 (3rd Cir. 2000); *Piekarski v. Bogan*, 912 F.2d 224, 225 (8th Cir. 1990); *Norwood v. Brennan*, 891 F.2d 179, 181-82 (7th Cir. 1989); *Dallas v. Martin*, 929 F.2d 587, 589 & n.4 (10th Cir. 1991). The Tenth Circuit issued a conflicting ruling that the statute did not become effective until December 7, 1987. Indeed, the Tenth Circuit decision conflicted with prior decisions of that Court. *See Dallas v. Martin*, 929 F.2d 587 (10th Cir. 1991).

United States Supreme Court stated in *Mistretta v. United States*, 488 U.S. 361, 366 (1989):

> It is observed that the indeterminate-sentencing system had "unjustified" and "shameful" consequences. The first was the great variation among sentences imposed by different judges upon similarly situated offenders. The second was the uncertainty as to the time the offender would spend in prison.

Over three years later, on December 7, 1987, Congress amended Section 235(b)(3) by repealing *only* the release criteria and restoring the criteria under 18 U.S.C. §4206, Public Law 100-182, §2. Significantly, Congress expressly provided: "The amendments made by this Act shall apply with respect to offenses committed *after* the enactment of this Act." Public Law 100-182, §26. (Emphasis added.) The amendment did *not* resurrect the Commission which became extinct as of midnight on October 11, 1989, by the terms of the original Section 235(b)(3).

This petition therefore involves the wrongful application of Section 235(b)(3) of the SRA which: (1) became effective October 12, 1984, *Lyons v. Mendez*, 303 F.3d 285, 289 (3rd Cir. 2002),[3] (2) provided a mechanism by which

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[3] The Tenth Circuit issued a conflicting ruling that Section 235(b)(3) did not become effective until November 1, 1987. (Memorandum of Decision at 4.) This is contrary to Congress' expressed intent. Indeed, according to the Commission's quarterly meeting minutes from November 14, 2002 (submitted December 26, 2002), the Commission stated: "[O]n October 12, 1984 Congress eliminated federal parole and set in place provisions at Section 235(b) of the Sentencing Reform Act for the transition from a sentencing/punishment system with parole eligibility to one in which the offenders would serve determinate sentences." *See also* note 2 *supra*.

prisoners sentenced "under the old system" would be issued a release date within a five-year period from the Act's effective date, and (3) mandated "the Parole Commission [to] set a release date consistent with the applicable parole guideline" for those remaining in its custody "prior to the expiration of the five years." Pub. L. 98-473, Title II, Section 235(b)(3).

The Tenth Circuit never even addressed Congress' mandate that Public Law 100-182, §2, applied only prospectively.[4] In direct contravention of the statutory scheme, the Tenth Circuit upheld the Commission's refusal to establish dates of release within the parole guidelines, as mandated by Congress, before the Commission statutorily expired on midnight of October 11, 1989. By doing so, the Tenth Circuit violated the ex post facto, the bill of attainder and due process clauses of the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. THE TENTH CIRCUIT IGNORED CONGRESS' MANDATE THAT PUBLIC LAW 100-182, §2, APPLIED ONLY PROSPECTIVELY.

The Tenth Circuit completely ignored that the December 7, 1987 amendment applied *only* to crimes committed after that date and, therefore, unnecessarily addressed Constitutional issues. Indeed, since the amendment

[4] The Tenth Circuit, as did the District Court, literally accepted the government's argument to ignore Congress' mandate that the amendment "shall apply with respect to offenses committed after the enactment of the Act . . . [of] December 7, 1987."

applied prospectively, the Tenth Circuit erred in ruling that the original Section 235(b)(3) did not control Petitioners' right to a release date before the expiration of the Commission on midnight of October 11, 1989.

Courts must read statutes, wherever "fairly possible," to avoid serious constitutional issues. *INS v. St. Cyr*, 533 U.S. 289, 300 (2001); *Landgraf v. USI Film Products*, 511 U.S. 244, 265, 268-69 (1994); *United States v. Safarini*, 257 F.2d 191, 196 (D.C. 2003). Indeed, where, as here, Congress has mandated the effective date, a "statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date." *INS*, 533 U.S. at 317, *quoting, Landgraf*, 511 U.S. at 257. *See also Rivers v. Roadway Express Inc.*, 511 U.S. 298, 313 n.12 (1994) ("In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted"). Section 235(b)(3), as enacted and effective on October 12, 1984, clearly and unconditionally included all "old law" prisoners that would be in the Commission's jurisdiction on the day before five years from the effective date – and that includes Petitioners.

Thereafter, Congress expressly declared that the December 7, 1987 amendment would apply to "offenses committed after [its] enactment." Hence, it is "not even arguable [to] suggest that it has any application to conduct that occurred" before December 7, 1987. *Martin v. Haddix*, 527 U.S. 343, 352 (1999). Absent "a 'clear congressional intent' favoring retroactive application," the presumption against retroactivity controls. *Martin*, 527 U.S. at 354, *quoting, Landgraf*, 511 U.S. at 263, 280.

The Tenth Circuit, however, completely ignored that Public Law 100-182, §2, applied only to offenses committed after its effective date. To compound that error, the Tenth Circuit erroneously determined the effective date of the original Section 235(b)(3) which applied to Petitioners as of October 12, 1984, instead ruling it became effective on November 1, 1987.[5] In any event . . . , the amendment could not apply to the Petitioners whose offenses were all committed before December 7, 1987. This error is particularly egregious where, as here, the constitutional infirmities could have been avoided by the Tenth Circuit's simply following Congress' mandate that Public Law 100-182, §2, applied only to crimes committed after December 7, 1987. *See* Public Law 100-182, §26. This Court should grant the instant petition for this reason alone to correct this error by the Tenth Circuit which conflicts with decisions of other circuits and its own circuit.

II. THE TENTH CIRCUIT ERRED IN RULING THAT PUBLIC LAW 100-182, §2 DID NOT VIOLATE THE EX POST FACTO AND BILL OF ATTAINDER CLAUSES WITH RESPECT TO THE PETITIONERS.

In ruling that Defendants have not violated the ex post facto and bill of attainder clauses of the Constitution, the Tenth Circuit committed clear error by *completely ignoring* the case of *Lynce v. Mathis*, 519 U.S. 433, which controls the issue presented. A law violates the ex post facto and bill of attainder clauses if it disadvantages the offender affected by "increasing the punishment for the

[5] This ruling conflicts with rulings of other circuits. *See* Notes 2 and 3 *supra*.

crime." *Lynce*, 519 U.S. at 441. *See also Collins v. Youngblood*, 497 U.S. 37, 50 (1990). In *Lynce*, 519 U.S. at 441, 443-46, the United States Supreme Court applied two factors: (1) the act "'must apply to events occurring before its enactment,' and it (2) 'must disadvantage the offender affected by it.'" *See also Weaver v. Graham*, 450 U.S. 24, 29 (1981). "The relevant essential inquiry demanded by the Ex Post Facto Clause" is "whether the [legislative action] had the effect of lengthening [the] period of incarceration." 519 U.S. at 443.

It is beyond question that, as applied by the Tenth Circuit, Public Law 100-182, §2, "had the effect of lengthening [Petitioners'] period of incarceration" from the provisions in effect under the original Section 235(b)(3). Just as in *Lynce*, "it is quite obvious that the retroactive change was intended to prevent the early release of prisoners . . . who had accumulated" a right to mandatory release within the parole guidelines under the original Section 235(b)(3). 519 U.S. at 445. The December 1987 amendment clearly "disadvantaged" the Petitioners because "it . . . prolonged [their] imprisonment." 519 U.S. at 446-47.

Instead of applying the *Lynce* analysis, the Tenth Circuit accepted the government's argument (which was rejected in *Lynce*): "that petitioner[s] [are] not entitled to relief because [the mandatory release provisions under the original Section 235(b)(3)] was a statute enacted after the date of [their] offense[s] rather than pursuant to [statutes in effect at the time of their offenses]." *Lynce*, 519 U.S. at 447.

Under *Lynce*, ex post facto analysis requires a determination of the law in effect when the retroactive change

"lengthening [the] period of incarceration" became effective. As of the effective date of the original Section 235(b)(3) (October 12, 1984), that statute governed the terms of imprisonment and release of Petitioners. Instead of analyzing the effect Public Law 100-182, §2 had on the rights provided to Petitioners under the original Section 235(b)(3) as originally enacted, the District Court looked to the originally imposed lengths of sentences and 18 U.S.C. §4206, to determine the actual effects upon their sentences. This analysis ignored the appropriate ex post facto analysis as established in *Lynce.*

The Tenth Circuit thus erroneously failed to address the real question presented which necessarily turns upon the state of the law before the effective date of December 7, 1987 legislation. *Carmell v. Texas*, 529 U.S. 513, 520 (2000) ("'The critical question [for an ex post facto violation] is whether the law changes the legal consequences of acts completed before its effective date.'") (*quoting Weaver v. Graham*, 450 U.S. 24, 31 (1981)). Just as the "overcrowding statute in effect" at the time of *Lynce's* offense "was modified in subsequent years" leading to the accumulation of additional good-time credits which reduced *Lynce's* confinement from his original sentence, *Lynce*, at 447-449; so too, the original Section 235(b)(3) enacted after Petitioners' offenses, shortened Petitioners' sentences. Section 235(b)(3) modified the Commission's discretionary release authority under 18 U.S.C. §4206 and mandated non-discretionary release under the parole guidelines. Public Law 100-182, §2 clearly "change[d] the legal consequences" of their sentences as they existed "before its effective date" and the change was highly detrimental [literally penalizing] to Petitioners. Public Law 100-182, §2 which amended Section 235(b)(3) and restored the

Commission's arbitrary and capricious decision-making until its expiration on October 11, 1989, the retroactive application in violation of Congress' express statement of prospective application only is classically unconstitutional.[6] *Weaver v. Graham*, 450 U.S. at 33 ("[A] retroactive law . . . can be constitutionally applied to Petitioners only if it is not to [their] detriment.") (*citing Dobbert v. Florida*, 432 U.S. 282, 293-294 (1977)); *Ex Parte Medley*, 134 U.S. 160 (1890).

Lyons v. Mendez, 303 F.3d 285, is the only case found by Petitioners that addresses the penultimate issue raised herein. In that case, Lyons committed his offense and was sentenced in 1986. The Court reviewed the entire statutory scheme to determine the effective date of Section 235(b)(3) and whether the mandatory release dates applied to him. The Court correctly concluded that Section 235(b)(3) became effective on October 12, 1984. 303 F.3d at 291 ("Section 235(b)(3) took effect upon enactment"). In doing so, it reasoned that, to hold that Section 235(b)(3) did not take effect until November 1, 1987, would create "an absurd result" by prohibiting the other criteria necessary to engage the new Sentencing Commission and its guidelines within statutorily required periods. 303 F.3d at 291-292 (quoting and adopting the reasoning of *Romano v. Luther*, 816 F.2d 832, 839 (2nd Cir. 1987)).

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[6] The amendment did not in any way resurrect the Commission. The Commission expired as of October 11, 1989. Any attempt by Congress to resurrect it thereafter was null and void. In any case a Parole Commission and statutes created or re-created on December 1, 1990 would present a clear *ex post facto* problem, if applied to Petitioners, who were no longer subject to Parole or a Parole Commission and, who, by prior law, had been congressionally ordered to be released within certain dates.

Since the Lyon's Court correctly determined that the effective date of §235(b)(3) is October 12, 1984, this necessarily means that the five-year period ended on October 11, 1989, and the Commission and all the parole laws listed in §§218(a) and 235(b)(1) were abolished and repealed on October 12, 1989. *See e.g. Piekarski v. Bogan*, 912 F.2d 224, 225 (8th Cir. 1990) (Parole Commission abolished in 1989, five years after date of enactment of §325(b)(3)).

Thus, the first five-year continuation of the Commission and the parole statutes, enacted by Public Law 101-650, Section 316, 104 Stat. 5115, on December 1, 1990, simply had no operational effect.[7] There was no Commission or parole statutes left to continue for five years, and the amendments passed since that time granting additional extensions, the latest being Public Law 107-273, Section 11017(a), 116 Stat. 1758, 1824 (2002), have no applicability, and certainly not respecting Petitioners.

III. THE TENTH CIRCUIT'S RULING UPHELD A SENTENCING SYSTEM DECLARED BY CONGRESS TO BE ARBITRARY AND CAPRICIOUS VIOLATING THE DUE PROCESS CONSTITUTIONAL PROHIBITION FAILING TO PROTECT PETITIONERS' LIBERTY OF WHICH THEY WERE CONSTITUTIONALLY ENTITLED.

The Tenth Circuit *never even addressed* Petitioners' argument that their due process rights were denied by application of the December 7, 1987 amendment. This due

[7] *See* Note 6 *supra*.

process analysis is supported by the very purposes Congress enacted the original Section 235(b)(3).

Section 235(b)(3) was enacted to obviate the "arbitrary and capricious" punishment inherent and uncorrectable in the federal parole system. Sen. Rep. No. 98-225, at 65 ("Conclusions" finding parole system "arbitrary and capricious" requiring "correction"). Despite Congress' recognition of the inherent arbitrariness of the system under which the Commission exercised discretion in determining parole dates, the Tenth Circuit held Public Law 100-182, §2, applied to Petitioners and thereby restored the very arbitrary and capricious system that Congress abolished. This ruling is blatantly wrong since the Commission's decisions relative to the Petitioners are arbitrary and capricious as a matter of law in violation of the Due Process Clause of the Fifth Amendment.

The loss of liberty and criminal punishment present significantly different considerations. It would be entirely irrational to suppose Congress intended to subject Petitioners to punishment already declared "arbitrary and capricious" by Congress. *Cf. Wolf v. Mcdonnell*, 418 U.S. 539, 588 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government.")

Because Congress mandated that the amendment applied only prospectively, Congress did not violate Petitioners' due process rights. However, the Commission and the courts are doing so by defying the mandate of Congress, and the Commission, as upheld by the courts, is acting arbitrarily and capriciously in violation of Petitioners' due process rights just as Congress recognized.

CONCLUSION

In accordance with the arguments and authorities set forth herein, Petitioners respectfully request that this Court grant its Petition for a Writ of Certiorari and find that the Tenth Circuit erroneously failed to apply Amended Section 235(b)(3) only prospectively, or, alternatively, that Amended Section 235(b)(3), as applied retroactively, is unconstitutional and that the matter should be remanded to the United States District Court to take appropriate action to enforce the original Section 235(b)(3).

Respectfully submitted,

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February 22, 2005

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

RAYMOND L. BLEDSOE; BILLY E. DACUS; MARSHALL E. WILLIAMS, Petitioners-Appellants, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 03-3224

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS
(D.C. No. 01-CV-3168-RDR)

(Filed Oct. 1, 2004)

Submitted on the briefs:

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Eric F. Melgren, United States Attorney and Nancy Caplinger, Assistant United States Attorney, District of Kansas, and Richard A. Friedman, Appellate Section, Criminal Division, United States Department of Justice, Washington, D.C., for Respondents-Appellees.

Before **TACHA**, Chief Judge, **MURPHY**, Circuit Judge, and **CAUTHRON**,* Chief District Judge.

MURPHY, Circuit Judge.

In this appeal we are asked to determine whether a 1987 amendment to the Sentencing Reform Act violated petitioners' rights to due process, or was otherwise an unlawful bill of attainder or *Ex Post Facto* law. Because we answer those questions in the negative, we affirm the decision of the district court.**

Background and Procedural History

Before November 1, 1987, The Parole Commission and Reorganization Act of 1976 (PCRA) governed the terms of federal sentences. Pub. L. No. 94-233, § 2, 90 Stat. 219 (codified as amended at 18 U.S.C. §§ 4201-4218 (1982)

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* The Honorable Robin J. Cauthron, Chief District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

** After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

Petitioners had requested oral argument both in their brief and in a separate motion, and respondent had noted that it was "not opposed" to argument being granted. But, because this case may be decided entirely on the briefs, we have determined that oral argument is not necessary.

(repealed 1984, effective 1987)). The PCRA empowered the Parole Commission to evaluate prisoners' behavior and to award them early release on the basis of positive institutional adjustment. *See* 18 U.S.C. § 4206. Dissatisfied with this system, Congress passed the Sentencing Reform Act of 1984 (SRA). The SRA became effective on November 1, 1987, when it repealed and replaced the PCRA. Pub. L. No. 98-473, §§ 212, 218, 98 Stat. 1987, 2027 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86, 28 U.S.C. §§ 991-98 (1988)). Under the SRA, parole was to be abolished, the Parole Commission was to be phased out, and prisoners were to serve uniform sentences under sentencing guidelines. *See id.*

The SRA originally provided that, before the end of its extinction after a five-year window, the Parole Commission was to reset the release dates of prisoners who were serving sentences imposed before the SRA's effective date to comport with the SRA's guidelines. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987, 2032 (1984), reprinted in 18 U.S.C. § 3551 note (1988). Section 235(b)(3) of the original SRA provided that:

> The United States Parole Commission shall set a release date, for an individual who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act, that is within the range that applies to the prisoner under the applicable parole guideline. A release date set pursuant to this paragraph shall be set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the

> expiration of five years following the effective date of this Act.

Id.[1]

In *Lewis v. Martin,* 880 F.2d 288, 290 (10th Cir. 1989), this court characterized Section 235(b)(3) as

> a "winding-up" provision to ensure that the Parole Commission will set release dates for all prisoners sentenced under the old statutes before it goes out of business on November 1, 1992. *See id.* at 839-40. The subsection does not require the Commission to take immediate action on the release date of any prisoner. Rather, by its own terms, the subsection requires the Commission to set a release date for any prisoner within its jurisdiction sufficiently before November 1, 1992, to allow him time to appeal the decision.

Id. at 290.[2]

On December 7, 1987, thirty-six days after the SRA became effective, Congress amended the Act to clarify that the terms of the PCRA would continue to govern the sentences of those prisoners sentenced prior to the effective date of the SRA, and extended the life of the Parole Commission to administer those sentences. Sentencing Act

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[1] The five-year period after the effective date of the Act began to run on November 1, 1987. *Lewis v. Martin,* 880 F.2d 288, 290 (10th Cir. 1989) (citing *Lightsey v. Kastner,* 846 F.2d 329, 332 (5th Cir. 1988), and *Romano v. Luther,* 816 F.2d 832, 837-39 (2d Cir. 1987)).

[2] Congress has repeatedly extended the life of the Parole Commission to administer those prisoners with pre-SRA sentences. *See, e.g.,* Pub. L. No. 101-650, Title III, § 316, 104 Stat. 5089, 5115 (extension for ten years); Pub. L. No. 104-232, § 2(a), 110 Stat. 3055 (extension for fifteen years). The life of the Commission has most recently been extended to October 31, 2005. *See id.*

of 1987, Pub. L. No. 100-182, § 2(b)(2), 101 Stat. 1266 (1987). As we explained in *Lewis v. Martin,*

> On December 7, 1987, section 235(b)(3) was amended to delete the clause requiring the Commission to set release dates within the guideline range. *See* Sentencing Act of 1987, Pub. L. 100-182, § 2(b)(2), 101 Stat. 1266 (1987) (1987 amendment). The amended section 235(b)(3) requires the Commission to set release dates 'pursuant to section 4206 of Title 18 United States Code,' which permits release dates outside the guideline range.

880 F.2d at 290.

Petitioners, three federal prisoners who were sentenced for violent crimes prior to 1987, object to the application of this 1987 amendment. They brought petitions for writs of habeas corpus pursuant to 28 U.S.C. § 2241 arguing that, during the thirty-six days in which the original Section 235(b)(3) was in effect, a liberty interest arose that guaranteed them the right to be resentenced under the new sentencing guidelines. Because they have not been resentenced, they argue that their due process rights have been abridged. They further maintain that the 1987 amendment to the SRA, which clarified Section 235(b)(3) of the Act, was unconstitutional as either a bill of attainder or an *Ex Post Facto* law.

The district court of Kansas referred petitioners' case to a magistrate judge. The magistrate judge evaluated petitioners' arguments under the Due Process, as well as under the bill of attainder and *Ex Post Facto* clauses, and she found petitioners' arguments to be without merit. She found that petitioners did not have a cause of action under due process because the Tenth Circuit had held in *Lewis,*

880 F.2d at 290, that certain prisoners in custody before the effective date of the SRA had no statutory interest – and therefore no liberty interest – in being released within the SRA's guideline ranges. Aplt. App. at 0182-83. The magistrate judge determined that petitioners had not been subject to a bill of attainder because, by definition, a bill of attainder "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Id.* at 0184 (quoting *Nixon v. Adm'r of Gen. Servs.,* 433 U.S. 425, 468 (1977)). Congress's 1987 amendment to the SRA had not singled out any identifiable group of individuals, nor had it inflicted any punishment upon petitioners beyond maintaining their original sentences. *Id.* (citing *United States v. Dorlouis,* 107 F.3d 248, 257 (4th Cir. 1997)). Finally, the magistrate judge found that petitioners had not been subject to punishment in violation of the *Ex Post Facto* clause. Citing *United States v. Gerber,* 24 F.3d 93, 96 (10th Cir. 1994), the magistrate judge reiterated that the *Ex Post Facto* clause is violated only when a law imposes a greater punishment on an individual who commits an offense than the punishment that was in existence when the person committed the offense. *Id.* at 0183. Because the law in existence when the petitioners committed their crimes before 1987 permitted sentences beyond the SRA's guideline ranges, the 1987 amendment that maintained the continuity of the law in place when they committed those crimes did not violate the *Ex Post Facto* clause. *See id.* The district court adopted the findings and conclusions of the magistrate judge's report and recommendation, and it denied petitioners' applications for writs of habeas corpus.

Discussion

Because petitioners are federal prisoners, a certificate of appealability is not required to consider the district court's denial of a writ under 28 U.S.C. § 2241. *Montez v. McKinna,* 208 F.3d 862, 867 (10th Cir. 2000); *McIntosh v. United States Parole Comm'n,* 115 F.3d 809, 810 n.1 (10th Cir. 1997). We review a district court's denial of a writ under 28 U.S.C. § 2241 de novo. *Hunnicutt v. Hawk,* 229 F.3d 997, 1000 (10th Cir. 2000).

We agree with the district court's decision, and we note that arguments similar to petitioners' have been found to be without merit by federal appellate courts across the country. Today we join those circuits in holding that Congress's 1987 amendment to the SRA did not deny prisoners such as petitioners, who committed crimes before the effective date of the SRA, due process; the amendment was not a bill of attainder; nor did enactment of the amendment violate the *Ex Post Facto* clause.

Due Process

Petitioners do not have a liberty interest in having their release dates recalculated under the SRA because the SRA, for the thirty-six days it remained in its original form, does not necessarily apply to them. *See Lewis,* 880 F.2d at 290-91 (holding that certain prisoners who were incarcerated before the effective date of the SRA and whose sentences exceeded their guideline range had no statutory interest, and therefore no liberty interest under due process, in having their sentences reformed under the SRA). Although our decision in *Lewis* concerned a prisoner who would be released before the Parole Commission was scheduled to expire in 1992, our reasoning in that case has

broader application to prisoners scheduled for release after 1992. *Id.* at 291. We today confirm what has been assumed by the magistrate judge and the district court here that *Lewis* establishes that petitioners have no statutory interest – and therefore no vested liberty interest – in release under the SRA when there is no certainty that they may be in the custody of the Parole Commission when it expires.

In *Lewis,* we rejected a prisoner's argument that the original SRA had created a statutory right for all prisoners in custody before the Parole Commission's initial expiration date in 1992 to be resentenced under that statute's guidelines. We reasoned that: "If Lewis were correct, section 235(b)(3) [of the original SRA] would be transformed from a mere phase-out provision into a sweeping decision to grant earlier release dates to large numbers of federal prisoners currently serving time beyond their guideline-recommended release dates." *Id.* at 290-91. We then quoted at length from the Second Circuit's decision in *Romano v. Luther,* 816 F.2d 832, 840-41 (2d Cir. 1987), which discussed the history and context of the SRA, and which confirmed that "[s]ubsection 235(b)(3) is obviously designed to deal with a very specific problem – the need to be sure a parole date is established for all those who will still be in prison the day before the Parole Commission ceases to exist," not the desire to release pre-1987 prisoners within SRA guidelines. *Id.* at 841.[3] Because the Parole

[3] As the *Romano* court elaborated,

> The premise of Romano's argument is that Congress was so dissatisfied with the practice of the Parole Commission of setting release dates for some prisoners beyond their applicable guideline ranges that it enacted subsection 235(b)(3) to stop that practice and to require the Commission to set

(Continued on following page)

Commission would still be in existence when Lewis was to be released in 1989, we held that the provisions of the SRA did not apply to him. *Lewis,* 880 F.2d at 291.

Extension of our rationale in *Lewis* establishes that petitioners in the instant case similarly have no statutory interest – and therefore no vested liberty interest – in the SRA despite the fact that they have release dates after 1992, and despite the fact that the life of the Commission has, as of most recently, been extended to October 31, 2005, *see* Pub. L. No. 107-273, § 11017(a), 116 Stat. 1758, 1824 (2002), when petitioners' release dates are in 2007, 2008, and 2009. Because the language of the original SRA provision required the Commission to set release dates only for prisoners "who will be in its jurisdiction the day before the expiration of five years after the effective date of this Act" and the release dates were merely to be "set early enough to permit consideration of an appeal of the release date, in accordance with Parole Commission procedures, before the expiration of five years following the effective date of this Act," the implication is that the statute was solely to affect prisoners who would be under

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release dates within the applicable guideline range for a large group of prisoners – all those whose maximum sentences continue beyond the day before the transition period ends and the Commission is abolished. Though Congress expressed dissatisfaction with the Commission's use of its parole guideline system, *see* Senate Report at 53-56, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3236-39, its remedy was to replace the parole system with the new system of determinate sentencing without parole, not to require a large number of prisoners sentenced under the current system to be released within their applicable parole guideline ranges.

Id. at 841.

the jurisdiction of the Parole Commission just before the Commission expired. Pub. L. No. 98-473, § 235(b)(3), 98 Stat. 1837, 2032 (1984); *accord Romano,* 816 F.2d at 841; *Lightsey v. Kastner,* 846 F.2d 329, 332 (5th Cir. 1988). But *Lewis* and the Second Circuit's decision in *Romano* both establish that being in the "jurisdiction" of the Parole Commission means that the prisoner remains in the physical custody of the Parole Commission. *Lewis,* 880 F.2d at 290-91; *Romano,* 816 F.2d at 841; *accord Valladares v. Keohane,* 871 F.2d 1560, 1563 (11th Cir. 1989). Hence, the statute controls only the sentences of that limited group of prisoners who will actually be incarcerated the day before the Commission does finally and ultimately expire.[4] *See Romano,* 816 F.2d at 841; *accord United States ex rel. D'Agostino v. Keohane,* 877 F.2d 1167, 1171 (3d Cir. 1989) (reiterating that the "Commission was directed to set a release date for individuals sentenced under the old system who would still be incarcerated on the date prior to the expiration of the Commission"). And every time Congress extends the life of the Commission, the Commission need not set release dates again within the guidelines until just before the Commission is to expire. *See Romano,* 816 F.2d at 839; *accord, e.g., Stange v. United States Parole Comm'n,* 875 F.2d 760, 762 (9th Cir. 1989).

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[4] *See also Romano,* 816 F.2d. at 841 n.11 (recognizing the anomaly that will be present when the Commission must, at some future point, set release dates within the guidelines for prisoners who have already served sentences beyond the guidelines, but concluding that the number of prisoners that the anomaly will affect will be small and that the anomaly "is not a reason for construing the subsection as Romano does").

Because we will not know if petitioners will be in the group that must actually be resentenced under the guidelines on the day before the Commission expires until after Congress actually permits the Parole Commission to expire, we hold that petitioners do not now have a statutory interest, and therefore cannot have a liberty interest, in the language of the original SRA. *Lewis,* 880 F.2d at 290. And, because petitioners have not established that they will have a liberty interest in being resentenced under the SRA, we hold that petitioners have not established the violation of that interest as necessary to pursue a due process claim. *See Bd. of Pardons v. Allen,* 482 U.S. 369, 378 n.10 (1987) (noting that only when "statutes or regulatory provisions are phrased in mandatory terms or explicitly create a presumption of release [will] courts find a liberty interest" to support a due process claim). We thus affirm the district court's denial of petitioners' due process claim.

Bill of Attainder and Ex Post Facto Clause[5]

We also agree that the petitioners have not been subject to a bill of attainder, and that the 1987 amendment

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[5] In the unpublished case of *Gade v. United States Parole Comm'n,* 103 F.3d 144 (Table), No. 96-1341, 1996 WL 718127 (10th Cir. Dec. 13, 1996), we dismissed similar issues in a cursory fashion. We issue a published opinion today, but reach the same conclusion about the merits of these series of arguments. As we explained in *Gade,*

> Mark Winslow Gade appeals the district court's order denying his petition for a writ of habeas corpus brought pursuant to 28 U.S.C. § 2241. Gade argues that: (1) under the original version of § 235(b)(3) of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, § 235(b)(3), 98 Stat. 2032 (1984) (codified as amended at 18 U.S.C. § 3551 (1985 & Supp.

does not violate the *Ex Post Facto* clause. *See generally* U.S. Const. art. I, § 9, cl. 3 ("No Bill of Attainder or Ex Post Facto Law shall be passed.").

As the magistrate judge and district court appropriately noted, a bill of attainder "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon,* 433 U.S. at 468. The language of the 1987

1996)), and its original regulatory interpretation at 28 C.F.R. 2.64 (1987), the Parole Commission is required to set Gade's release date within the guidelines of sixty to seventy-two months and because he has already served in excess of seventy-two months he is entitled to immediate release; (2) the amended versions of § 253(b)(3) and 28 C.F.R. 2.64, which expressly allow the Parole Commission to set release dates outside the guidelines, are *Ex Post Facto* laws; and (3) in any event, the Parole Commission was required to release him in February, 1994, because he had then served eighty months, a third of his twenty-year sentence. The magistrate judge concluded that Gade's arguments have no merit and recommended that the district court dismiss the petition. The district court adopted the magistrate's opinion and denied the petition.

Gade's renewed arguments on appeal are simply variations on a theme that courts have been hearing from federal prisoners since the enactment of the original version of § 253(b)(3). This court and at least seven other circuits have rejected same or similar arguments. *See, e.g., Lewis v. Martin,* 880 F.2d 288 (10th Cir. 1989); *Piekarski v. Bogan,* 912 F.2d 224 (8th Cir. 1990); *Skowronek v. Brennan,* 896 F.2d 264 (7th Cir. 1990); *Valladares v. Keohane,* 871 F.2d 1560 (11th Cir. 1989); *Tripati v. United States Parole Comm'n,* 872 F.2d 328 (9th Cir. 1989); *United States[, ex rel. D'Agostino] v. Keohane,* 877 F.2d 1167 (3d Cir. 1989); *Lightsey v. Kastner,* 846 F.2d 329 (5th Cir. 1988); *Romano v. Luther,* 816 F.2d 832 (2d Cir. 1987). In view of the settled law on this subject, Gade's contentions are frivolous.

Gade, 1996 WL 718127, at **1 (footnote omitted).

amendment merely amended the original SRA to delete the clause requiring the Commission to set release dates within the guideline range. *See* Sentencing Act of 1987, Pub. L. No. 100-182, § 2(b)(2), 101 Stat. 1266 (1987) (1987 amendment); *Lewis,* 880 F.2d at 290. Petitioners are members of an entire class of persons who might be affected. Indeed, our earlier discussion whether petitioners may be affected by the language of the original provision of the SRA at all highlights the ambiguity of the provision and how imprecisely it is targeted. Because petitioners have thus not been targeted as "identifiable individuals," we hold that the 1987 amendment was not a bill of attainder. *Nixon,* 433 U.S. at 468; *Dorlouis,* 107 F.3d at 257.

Finally, we join many federal courts of appeal in holding that the 1987 amendment as applied to prisoners who committed crimes prior to the Sentencing Reform Act's enactment does not violate the *Ex Post Facto* clause.[6]

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[6] The most succinct analysis on this issue is a recent unpublished decision from the Seventh Circuit, which disposes of the question in no more than a few lines:

> Anthony Leisure is serving time for crimes committed before the Sentencing Reform Act of 1984. *See United States v. Leisure,* 844 F.2d 1347 (8th Cir. 1988). That statute called for all such persons to receive a determinate parole date, within the range determined by a set of guidelines, by 1992, when the Parole Commission would go out of existence. In 1987 Congress repealed this provision and extended the Parole Commission's existence indefinitely. Leisure has been considered for parole twice since 1987. On each occasion the Commission decided that he should be held until the expiration of his sentence in 2007. Leisure now seeks a writ of habeas corpus, *see* 28 U.S.C. § 2241, contending that the *Ex Post Facto* Clause prevents application to him of the 1987 statute and entitles him to release.
>
> Leisure misunderstands how the *Ex Post Facto* Clause works. He thinks that it gives prisoners the benefits of laws

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See, e.g., Fassler v. United States Parole Comm'n, 964 F.2d 877, 880 (9th Cir. 1991) (holding that, because the SRA did not affect the prisoner's sentence, the 1987 amendment to the SRA could have no *Ex Post Facto* effect); *United States v. McCall,* 915 F.2d 811, 816 (2d Cir. 1990) (holding that the SRA had no *Ex Post Facto* effect on a prisoner who, *inter alia,* had committed his crimes before the effective date of the Act); *United States v. Sussman,* 900 F.2d 22, 24 (3d Cir. 1990) ("[W]e reject defendant's argument because we conclude that defendant was never entitled to be sentenced under the sentencing guidelines. Therefore, defendant's *Ex Post Facto* rights were not violated."); *Tripati v. United States Parole Comm'n,* 872 F.2d 328, 330 (9th Cir. 1989) (per curiam) ("Tripati is not disadvantaged by the amendment [under the meaning of the *Ex Post Facto* clause] because neither section 235(b)(3) of the SRA as originally enacted nor as amended is applicable to

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in force at the time of their convictions – and as he was sentenced after the 1984 statute, but before the 1987 repeal, he thinks that this gives him vested rights under the 1984 law. That is not correct. The *Ex Post Facto* Clause forbids detrimental changes in law after the date of the criminal conduct. *See Weaver v. Graham,* 450 U.S. 24, 28 (1981). The dates of conviction and sentencing are irrelevant. *See Rogers v. Tennessee,* 532 U.S. 451, 456 (2001). Although the 1987 statute may cause problems with respect to persons whose offenses were committed after the 1984 law and before the repeal, *see Lyons v. Mendez,* 303 F.3d 285 (3d Cir. 2002), there is no constitutional problem with respect to crimes committed before the Sentencing Reform Act of 1984. Leisure is in exactly the position he would have occupied had none of the intervening statutes been enacted, so he has no legitimate constitutional complaint. *See Skowronek v. Brennan,* 896 F.2d 264 (7th Cir. 1990); *Norwood v. Brennan,* 891 F.2d 179 (7th Cir. 1989).

Leisure v. Hastings, 95 Fed. Appx. 181 (7th Cir. Mar. 24, 2004).

him."); *United States v. Haines,* 855 F.2d 199, 201 (5th Cir. 1988) ("[T]he later 1987 amendment made no change in the law. It merely confirmed the intent of the 1984 statute as Congress had enacted it [not to apply retroactively in violation of the *Ex Post Facto* clause]."); *United States v. Stewart,* 865 F.2d 115, 117-18 (7th Cir. 1988) ("We need only look to Congress' clearly expressed intent that the SRA would apply only to offenses committed on or after the effective date in order to avoid the apparently unconstitutional interpretation urged upon us by Stewart. . . . [And the 1987] amendment clarifying the meaning of the effective date of the SRA further supports our interpretation that Congress never intended, even with respect to the pre-amendment Act, for the SRA to apply to offenses committed prior to November 1, 1987."); *Lightsey,* 846 F.2d at 333 ("[We] face and reject the notion of *Ex Post Facto* unconstitutionality [in application of the 1987 amendment]."); *cf. United States v. Cooper,* 63 F.3d 761, 762 (8th Cir. 1995) (per curiam) (holding that, even when a defendant committed the last of his crimes after 1992, he had "fair warning" of the total penalty that additional criminal conduct would entail, and that warning was all that the *Ex Post Facto* clause required). *But cf. Lyons v. Mendez,* 303 F.3d 285, 286 (3d Cir. 2002) (holding that the 1987 amendment did constitute a violation of the *Ex Post Facto* clause as applied to increase a prisoner's sentence when the particular upward departures used by the Commission after passage of the amendment would not have been permitted when the prisoner committed his crime).

The *Ex Post Facto* clause is meant "to assure that legislative Acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver v. Graham,* 450 U.S. 24, 28-29 (1981);

see also Miller v. Florida, 482 U.S. 423, 430 (1987); *Dobbert v. Florida,* 432 U.S. 282, 293 (1977). The clause restrains "arbitrary and potentially vindictive legislation." *Weaver,* 450 U.S. at 29, 101 S.Ct. 960. "Critical to relief under the *Ex Post Facto* Clause is not an individual's right to less punishment," however, "but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated." *Id.* at 30.

We thus hold that application of the 1987 amendment to petitioners is not a violation of the *Ex Post Facto* clause because the amendment merely reinstated the same consequences that petitioners faced when they committed their crimes. Petitioners had fair warning of what their punishments would be, and the 1987 amendment in no way increased their punishments "beyond what was prescribed when the crime was consummated." *Id.* Indeed, because petitioners continue to serve their sentences under the same conditions as when they committed their crimes, the 1987 amendment merely clarified that they were not entitled to the windfall of shorter sentences under the guidelines. *See Norwood v. Brennan,* 891 F.2d 179, 182 (7th Cir. 1989). As other circuits have found before us, petitioners are not entitled to a writ of habeas corpus on this basis.

Conclusion

For the reasons stated above, we AFFIRM the district court's denial of a writ of habeas corpus. We GRANT petitioners' motion to substitute counsel and to file a substitute reply brief. We DENY their renewed request for

oral argument. Any other outstanding motions are DENIED as moot. The mandate shall issue forthwith.

RAYMOND L. **BLEDSOE**, BILLY E. DACUS, and MARSHALL D. WILLIAMS, PETITIONERS, v. UNITED STATES OF AMERICA, RESPONDENT.

CASE NO. 01-3168-RDR

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF **KANSAS**

2002 U.S. Dist. LEXIS 1515

January 29, 2002, Decided

COUNSEL: RAYMOND L **BLEDSOE**, Petitioner, Pro se, Leavenworth, KS.

BILLY E DACUS, petitioner, Pro se, Leavenworth, KS.

MARSHALL D WILLIAMS, petitioner, Pro se, Leavenworth, KS.

For USA, respondent: Jackie A. Rapstine, Office of United States Attorney, Topeka, KS.

JUDGES: CATHERINE A. WALTER, U.S. Magistrate Judge.

OPINION BY: CATHERINE A. WALTER

OPINION: REPORT AND RECOMMENDATION The court has referred this matter to the undersigned United States Magistrate Judge for report and recommendation on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. § 2241. Petitioners, prisoners confined at USP-Leavenworth, Leavenworth, Kansas, proceed *pro se*.

Petitioners argue that § 235(b)(3) of the Sentencing Reform Act, as originally enacted, required the Commission to set a mandatory release date within the applicable parole guidelines for each petitioner no later than October 31, 1992. By amending the law thirty-six days later to

clarify that parole was to be calculated according to 18 U.S.C. § 4206, petitioners argue: 1) Congress deprived them, without due process, of a vested liberty interest, 2) the amendment is an impermissible *ex post facto* law, and 3) the amendment is an impermissible bill of attainder. Petitioners also argue a conflict of interest between the financial and personal interests of the employees of the Commission and the interests of petitioners violates their due process rights.

PROCEDURAL HISTORY

Petitioner, Raymond **Bledsoe**, was convicted of killing a man because of his race and sentenced to life on May 4, 1983, in the United States District Court for the Western District of Missouri. At his initial parole hearing on May 5, 1993, **Bledsoe's** parole guidelines were calculated at 120-plus months, more than 48 months above the minimum guideline range. The United States Parole Commission (Commission) set Mr. **Bledsoe's** reconsideration hearing for May 2008. At his statutory interim hearing on September 7, 1999, petitioner's reconsideration hearing was moved up to May 2007 because of positive institutional adjustment.

Petitioner, Billy E. Dacus, was convicted of bank robbery in the United States District Court for the Northern District of Texas and on January 13, 1983, he was sentenced to 45 years. On February 14, 1994, Dacus' parole guidelines were determined to be 166-plus months, more than forty-eight months above the minimum guideline range. His reconsideration hearing was scheduled for October 2008. Advancement of the reconsideration hearing

will be considered at petitioner's next statutory interim hearing if he has continued positive adjustment.

Petitioner, Marshall D. Williams, was convicted in the United States District Court for the Northern District of Texas on December 12, 1984, of malicious destruction of property by use of explosive bomb resulting in death, possession of an unregistered firearm, and unlawful construction of a firearm. Williams was sentenced to a term of 109 years. At Mr. Williams' initial parole hearing on October 17, 1994, his parole guidelines were calculated at 108-plus months, more than forty-eight months above the minimum guideline range. His reconsideration hearing was scheduled for October 2009. There has been no adjustment to this schedule since Williams' most recent statutory interim hearing on October 23, 2000.

Transferred from the United States District Court for the District of Columbia, this action was filed in this court on April 30, 2001 (Doc. 1). Respondent filed a pleading opposing the petition for writ of habeas corpus on August 27, 2001 (Doc. 45). Petitioners filed a traverse on September 24, 2001 (Doc. 46) and a supplement on October 10, 2001 (Doc. 47).

DISCUSSION

The Sentencing Reform Act of 1984 ("SRA") abolished the Parole Commission and repealed federal parole statutes. Pub. L. No. 98-473, Title II, ch. II, 98 Stat. 1987, 2017-2034 (codified as amended at 18 U.S.C. § 3551-3742 (1994)). In their place, the SRA set up a determinate sentencing scheme utilizing sentencing guidelines. *Id.* The SRA became effective on November 1, 1987. *Lewis v. Martin,* 880 F.2d 288, 290 (10th Cir. 1989).

In order to process prisoners convicted under the old parole system (including petitioners), the life of the Commission was originally extended to five years beyond the effective date of SRA. *See* 98 Stat. at 2027, 2032, § 218(a)(5), § 235(b)(1)(A). Congress has continued to extend the life of the Commission and it is now scheduled to expire on October 31, 2002. *See* Pub. L. No. 101-650, Title III, § 316, 104 Stat. 5089, 5115 (extension to ten years); Pub. L. No. 104-232, § 2(a), 110 Stat. 3055 (extension to fifteen years).

When the SRA was originally enacted, § 235(b)(3) instructed the Commission to set a release date for prisoners before the expiration of the Commission (originally set for November 1, 1992) and "within the range that applies to the prisoner under the applicable parole guideline." Pub. L. No. 98-473, § 235(b)(3), 98 Stat. 2032 (1984). Just thirty-six days after the SRA became effective, § 235(b)(3) was amended to clarify that release dates were to be set under 18 U.S.C. § 4206, the parole statute in effect when petitioners were convicted and sentenced. *See* SRA, Pub. L. 100-182, § 2(b)(2), 101 Stat. 1266 (1987) (1987 amendment). Section 4206 "permits release dates [to be set] outside the guideline range." *Lewis*, 880 F.2d at 290.

Petitioners' argument that the original act created a vested right to a release date within the parole guidelines, protected by due process, is without merit. In *Lewis*, 880 F.2d at 290, the Tenth Circuit determined that the original act did not give prisoners sentenced prior to the effective date of the SRA a right to be released within the guideline range. When all three of the petitioners were sentenced, 18 U.S.C. § 4206 allowed for release dates outside the guideline range if good cause was shown. The SRA did not change this because Congress intended preexisting law to

apply to those prisoners sentenced under the old parole system. *See Romano v. Luther,* 816 F.2d 832, 838 (5th Cir. 1987), *citing* Senate Report at 188-89, reprinted in 1984 U.S. Code Cong. & Admin. News 3182, 3371-72 ("preexisting law will apply as to all substantive matters including the imposable sentence" and "the parole and good time statutes will remain in effect as to any prisoner sentenced before the sentencing guidelines").

Petitioners also argue that the application of the amended SRA is a violation of the *ex post facto* clause. In the context of sentencing, the *ex post facto* clause is violated when a law imposes a greater punishment than the punishment in existence when the offense was committed. *United States v. Gerber,* 24 F.3d 93, 96 (10th Cir. 1994). Both the amended SRA and 18 U.S.C. § 4206, the law in effect when petitioners were convicted and sentenced,[1] allow for release dates beyond the guideline range. Because there is no increase in punishment to petitioners, there is no *ex post facto* violation. *Lightsey v. Kastner,* 846 F.2d 329, 334 (5th Cir. 1988).

Petitioners also argue amended § 253(b)(3) is an unconstitutional bill of attainder. A bill of attainder is a law which "legislatively determines guilt and inflicts punishment upon an identifiable individual without provision of the protections of a judicial trial." *Nixon v. Administrator of Gen. Servs.,* 433 U.S. 425, 468, 53 L. Ed.

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[1] Section 4206 became effective in 1976. Petitioner Bledsoe committed his crime in 1980 and petitioner Dacus committed his crime between 1981 and 1982. Although it is not clear from the record exactly when petitioner Williams committed his crime, he was convicted in 1984. This court will assume that he committed his crime sometime between 1976 and 1984.

2d 867, 97 S. Ct. 2777 (1977). The amended SRA does not single out any identifiable group of individuals and, as discussed earlier, it does not inflict any additional punishment upon petitioners. *U.S. v. Dorlouis,* 107 F.3d 248, 257 (4th Cir. 1997). Therefore, it is not a bill of attainder. *Id.*

Petitioners' final argument is that their due process rights have been violated because there is a conflict of interest between the interests of Commission employees and the interests of potential parolees. Petitioners assert that members of the Commission have intentionally built up a pool of unreleased prisoners in order to ensure their continued employment and delay the statutory abolishment of the Commission. Although prisoners are entitled to impartial decision makers, *White v. Indiana Parole Bd.,* 266 F.3d 759, 767 (7th Cir. 2001), petitioners' assertions of systemwide bias must fail because the alleged biasing influences are "too remote and insubstantial to violate due process", *Fero v. Kerby,* 39 F.3d 1462, 1478 (10th Cir. 1994).

RECOMMENDATION

IT IS, THEREFORE, RESPECTFULLY RECOMMENDED that the petition for a writ of habeas corpus be dismissed and all requested relief be denied.

Any party objecting to the recommended disposition may serve and file with the clerk of the district court **written objections within 10 days** of service of this

Report and Recommendation.[2] Any objection filed must specify the parts of the Report and Recommendation to which objections are made, and set forth the basis for such objections. *See* Fed.R.Civ.P. 72. Failure to file timely objections waives appellate review of both factual and legal questions. *Thomas v. Arn,* 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); *Soliz v. Chater,* 82 F.3d 373, 375 (10th Cir. 1996).

A copy of this Report and Recommendation shall be mailed to petitioner and counsel of record.

The filing of this Report and Recommendation terminates the referral of this case to the undersigned.

Dated this 29 day of January, 2002, at Topeka, Kansas.

CATHERINE A. WALTER
U.S. Magistrate Judge

[2] Any objections should be presented in a pleading entitled "Objections to Report and Recommendation" and filed with the clerk.

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

RAYMOND L. BLEDSOE; BILLY E. DACUS; MARSHALL E. WILLIAMS, Petitioners-Appellants, v. UNITED STATES OF AMERICA, Respondent-Appellee.	No. 03-3224

ORDER
Filed December 3, 2004

Before **TACHA**, Chief Judge, **MURPHY**, Circuit Judge, and **CAUTHRON**,[1] Chief District Judge.

This matter is before the court or appellants' petition for rehearing with suggestion for rehearing en banc.

The materials submitted by appellants and appellee have been reviewed by the members of the hearing panel, who conclude that the original disposition was correct. Accordingly, the petition is denied on the merits.

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[1] The Honorable Robin J. Cauthron, Chief District Judge, United States District Court for the Western District of Oklahoma, sitting by designation.

The petition having been denied on the merits by the panel to which the case was submitted, the suggestion for rehearing en banc was transmitted to all the judges of the court in regular active service in accordance with Rule 35(b) of the Federal Rules of Appellate Procedure. No member of the hearing panel and no judge in regular active service on the court having requested that the court be polled on rehearing en banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing en banc is denied.

Appellants' motion to file their reply brief is GRANTED. Appellants' petition for rehearing with suggestion for rehearing en banc is DENIED. Any other pending motion in this case is DENIED.

Entered for the Court
PATRICK FISHER, Clerk

By /s/ Steve Larson
Deputy Clerk